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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No.

TIMOTEO MARIANO ANDRES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Timoteo Mariano Andres, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review its final judgment, entered August 14, 1947, affirming

struction requiring unanimity before a qualified verdict could be returned. R. 110-113.

On the second ground of challenge the Circuit Court of Appeals ruled that it "hardly justifies notice". R. 114. On the third ground of challenge the Court did not rule at all. R. 106-113.

As stated, a petition for rehearing was denied on October 8, 1947. R. 115.

QUESTIONS PRESENTED.

1. Does the decision of this court in *Winston v. United States*, 172 U. S. 303, 19 S. Ct. 212, 43 L. Ed. 456, deprive a trial court of authority to prescribe rules for the guidance of a jury in exercising their discretion to add the words "without capital punishment" to a verdict finding an accused guilty of the crime of murder in the first degree?

2. Is petitioner under sentence of death as the result of an unfair trial in which the jury instructions invaded or impaired the discretion of the jury to add the words "without capital punishment" to their verdict finding him guilty of the crime of murder in the first degree?

3. Is petitioner under sentence of death as the result of an unfair trial in which the jury were told that the indictment against him reflected a finding by the grand jury that he was probably guilty of the crime of murder in the first degree?

4. Did the District Court of the United States for the territory of Hawaii have power to sentence petitioner to be hanged by the neck until dead?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. **THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN WINSTON v. UNITED STATES, 172 U.S. 303, ON A QUESTION OF PARAMOUNT IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE.**

Section 330 of the Criminal Code, 18 U.S.C.A., sec. 567, provides:

> "In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment', and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

There is nothing in the language of the section which deprives a trial court of authority to prescribe rules for the guidance of the jury in exercising the discretion conferred upon them by the section.

The section was interpreted by this court in the case of *Winston v. United States*, 172 U. S. 303, and it was there said, at pages 312 and 313:

> "The right to qualify a verdict of guilty, by adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining

or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

That language was used by the court in reviewing and condemning an instruction in which the trial judge had announced his views that the qualification should not be added "unless it be in cases that commend themselves to the good judgment of the jury—cases that have palliating circumstances which would seem to justify and require it".

The obvious scope of the *Winston* case is to prohibit trial courts from *limiting* jury discretion in the matter of qualifying their verdicts. That was the view taken by the District Court in *United States* v.

Williams, 103 F. 939, in granting a new trial. Nothing can be found in the language of the *Winston* case which prohibits trial courts from *explaining* to juries the scope of their discretion to the end that it may be fully and humanely exercised. On the contrary, the *Winston* case invites, if it does not command, trial courts to instruct juries that their discretion in the matter of qualifying their verdicts is not limited to cases in which there are palliating circumstances. And in the *Winston* case there is another invitation, if not command, that juries be instructed as to the "considerations" therein mentioned which may properly prompt a jury to exercise its discretion.

The decision of the Circuit Court of Appeals herein holding that because of the *Winston* case a trial court can do nothing more than tell a jury that they have a discretion to qualify their verdict, is clearly wrong. The *Winston* case reflects the entire law on the subject in this court. The question is of paramount importance in the administration of criminal justice. Upon its proper determination depends the life or death of your petitioner. He earnestly urges that a writ of certiorari should be granted.

2. **PETITIONER IS UNDER SENTENCE OF DEATH AS THE RESULT OF AN UNFAIR TRIAL IN WHICH THE JURY INSTRUCTIONS INVADED AND IMPAIRED THE DISCRETION OF THE JURY TO ADD THE WORDS "WITHOUT CAPITAL PUNISHMENT" TO THEIR VERDICT FINDING HIM GUILTY OF THE CRIME OF MURDER IN THE FIRST DEGREE.**

Similar considerations caused the reversal of the judgment imposing the death penalty in the *Winston* case. It was there pointed out that in cases like the present a qualified verdict could be based upon sympathy and upon facts and circumstances not appearing in the evidence. Here the jury was instructed to eliminate sympathy and to confine itself to the evidence and to the issues. And here certain forms of verdict, including a qualified form of verdict, were given to the jury with the instruction that they could find *"any one of them"*, *"as the evidence and the circumstances in the evidence . . . may warrant"*. R. 26, 99.

These instructions plainly invaded and impaired the discretion of the jury to qualify their verdict. Intolerant to the *Winston* case, petitioner is therefore under sentence of death as the result of an unfair trial.

This is marked in a further respect. The jury were here told that in order to return a qualified verdict their decision *must* be unanimous. R. 25, 97. This was the equivalent of telling them that if they were unanimous in agreeing that petitioner was guilty of murder in the first degree but could not agree as to the qualification they were nevertheless to return a verdict of murder in the first degree without qualification. The forms of verdict submitted to them by the

court left no other alternative. R. 26, 99. The Circuit Court of Appeals saw no error in this. It resolved all doubtful questions, inferences, and intendments against the petitioner. But surely where petitioner's life is at stake all doubtful questions, inferences, and intendments should be resolved in his favor. That was the view of the law taken by this court in the *Winston* case. And surely it cannot be said that the ends of criminal justice will be satisfied by permitting the petitioner to be "hanged by the neck until dead" where it appears that because of questionable instructions the jury which convicted him failed to reach the unanimous agreement that their verdict be not qualified.

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3. PETITIONER IS UNDER SENTENCE OF DEATH AS THE RESULT OF AN UNFAIR TRIAL IN WHICH THE JURY WERE TOLD THAT THE INDICTMENT AGAINST HIM REFLECTED A FINDING BY THE GRAND JURY THAT HE WAS PROBABLY GUILTY OF THE CRIME OF MURDER IN THE FIRST DEGREE.

The Circuit Court of Appeals said that this point "hardly justifies notice". R. 114. The Circuit Courts of Appeals in the Third and Eighth Circuits hold otherwise. *United States v. Schauerman,* 3 Cir., 150 F. 2d 941, 945; *Gold v. United States,* 3 Cir., 102 F. 2d 350, 352; *Naufito v. United States,* 8 Cir., 20 F. 2d 376, 378; *Cooper v. United States,* 8 Cir., 9 F. 2d 216, 226.

Petitioner urges that a writ of certiorari should be granted to secure uniformity of decision, and in order that he may have the benefit of the law declared in the foregoing cases.

4. **THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII DID NOT HAVE POWER TO SENTENCE PETITIONER TO BE HANGED BY THE NECK UNTIL DEAD.**

The Circuit Court of Appeals did not pass upon this point although it was impressed upon it in the briefs and in the petition for rehearing.

Section 542, Title 18, U.S.C.A. provides:

> "The manner of inflicting punishment of death shall be the manner prescribed by the laws of the state within which the sentence is imposed. The United States Marshal charged with the execution of the sentence may use available state or local facilities and the services of an appropriate state or local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the state within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other state in which such sentence shall be executed in the manner prescribed by the laws thereof."

This court has held that the word "state", as used in the statute cannot be construed to include territories. *Dawnes v. Bidwell,* 182 U. S. 244, 45 L. Ed. 1088; *Hepburn v. Ellzy* 6 U. S. 445, 2 L. Ed. 332; *Scott v. Jones,* 46 U. S. 343, 12 L. Ed. 181; see, also, *Territory of Alaska v. Troy,* 258 U. S. 101, 66 L. Ed. 487.

The District Court sentenced petitioner to be hanged by the neck until dead because that was the manner of inflicting punishment of death in the Territory of

Hawaii. Under the cases cited a "territory" is not a "state" within the meaning of criminal laws. The Supreme Court of the Territory of Hawaii has reached the same conclusion. *Territory v. Carter,* 19 Haw. 198, 199. The District Court's lack of power is therefore manifest.

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
November 3, 1947.

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